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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: MT&H Systems, LLC

File: B-410141

Date: September 29, 2014

Richard L. Moorhouse, Esq., and Jozef S. Przygodzki, Esq., Greenberg Traurig LLP, for the protester.

Gabriel Lopez, Esq., Department of Housing and Urban Development, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of proposals and source selection decision is dismissed where protester's allegations are untimely, fail to state a basis for protest, or do not demonstrate that the agency's actions were prejudicial to the protester.

DECISION

MT&H Systems, LLC, of Severn, Maryland, protests the award of a contract to Brunswick BCT Group, LLC, of New Brunswick, New Jersey, under request for proposals (RFP) No. DU208WP-14-R-0002, issued by the Department of Housing and Urban Development (HUD) to acquire various business support services. MT&H maintains that the terms of the RFP were misleading to offerors other than the incumbent, that it was misled by the agency during the acquisition, and that the agency misevaluated proposals.

We dismiss the protest.

The RFP contemplates the award of a fixed-price contract to perform various services and produce various reports during a base year and up to four 1-year option periods. RFP at 1-18. Firms were advised that the agency would make award on a "best value" basis, considering price and three non-price considerations, technical approach, management work plan and past performance. RFP at 66. The three non-price considerations, collectively, would be considered significantly

more important than price.¹ Id. Award was to be made without conducting discussions. RFP at 66.

The agency received 18 proposals in response to the RFP. In evaluating proposals, the agency assigned ratings of excellent to the Brunswick proposal under each non-price evaluation factor, and assigned ratings of excellent under the technical factor and good under the management work plan and past performance factors to the MT&H proposal. Agency Report (AR), exh. C, Evaluation Report, at 5. Brunswick submitted a price of \$4,500,715 (the lowest proposed price among all offerors), while the protester submitted a price of \$15,418,434 (the highest proposed price among all offerors). Id. at 98. On the basis of these evaluation results, the agency made award to Brunswick without conducting discussions, finding that its proposal represented the best value to the government. After learning of the agency's award decision and requesting and receiving a debriefing, MT&H filed this protest.

MT&H, the incumbent contractor, asserts that the RFP was misleading to all offerors other than the incumbent because it included information about the value of a bridge contract that MT&H had been performing. According to the protester, the agency, in response to a prospective vendor question, issued a solicitation amendment advising prospective offerors that the value of that bridge contract was approximately \$469,000. RFP, Attach. F, Question No. 1. MT&H maintains that this figure is misleading because the actual value of the bridge contract was approximately \$1.8 million.

We dismiss this aspect of MT&H's protest as untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014), protests challenging the terms of a solicitation must be filed before the deadline for submitting proposals. Here, the RFP, as amended, included information that MH&T contends was misleading to other prospective offerors. Thus, to be timely, any protest by MT&H concerning this aspect of the solicitation had to be filed prior to the deadline for submitting proposals. Since MT&H did not raise its concern regarding the terms of the RFP until after award of the contract, its allegation is untimely and therefore not for consideration on the merits.

MT&H asserts that it brought its concern to the agency's attention prior to the deadline for submitting proposals, and that the agency declined to issue an amendment in response to its concern. MT&H states that it was told by the contract specialist that the agency could clarify the issue through discussions with vendors if necessary. MT&H therefore contends that it did not file a protest with our Office

¹ The RFP did not specify the individual relative weights of the non-price evaluation factors; accordingly, they are presumed to be approximately equal. GVC Companies, B-254670.5, Sept. 2, 1994, 94-2 CPD ¶ 86 at 2.

prior to the deadline for submitting proposals in reliance on the advice of the contract specialist.

The record shows that the contract specialist's representation to MT&H did not provide a basis for the firm to delay filing a timely protest. In this connection, the record shows that there was an e-mail exchange between MT&H and the agency's contract specialist, during which MT&H's director specifically asked the agency to amend the RFP because it considered the terms of the solicitation inaccurate. AR, exh. F, E-mail Exchange Between MT&H and the Contract Specialist. In response to the protester's e-mail, the contract specialist specifically declined to issue the requested amendment.

In essence, MT&H's e-mail exchange with the contract specialist was an agency-level protest because MT&H objected to the terms of the RFP and asked the agency issue an amendment to rectify MT&H's concern. Dynamac Corp., B-252800, July 19, 1993, 93-2 CPD ¶ 37 at 3 (fact that communication with agency was not specifically designated a protest by protester is not relevant, since communication clearly conveyed an expression of dissatisfaction and a request for corrective action). In response, HUD declined to issue the requested amendment.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), where a protester files an initial, timely, agency-level protest, any subsequent protest to our Office must be filed within 10 days of when the protester has actual or constructive knowledge of adverse agency action in response to its agency-level protest. Here, the record shows that MT&H became aware of the agency's refusal to issue the requested amendment through its receipt of the contract specialist's e-mail on February 19. AR, exh. F, E-mail Exchange Between MT&H and the Contract Specialist. At that point, to be timely in our Office, MT&H was required to file no later than 10 days after receipt of that e-mail. Since MT&H did not file within that time, its protest to our Office is untimely. American Physical Security Group, LLC, B-405059, July 25, 2011, 2011 CPD ¶ 139 at 5. We therefore dismiss this aspect of MT&H's protest.

MT&H also argues that the contract specialist's representation that the agency could conduct discussions if necessary essentially created a requirement that the agency conduct discussions with the other offerors, once it became clear that the other offerors may have been misled by the allegedly inaccurate information about the value of the bridge contract.

This aspect of MT&H's protest also is untimely. While the RFP reserved to the agency the right to engage in discussions, it nonetheless expressly advised offerors that the agency intended to make award without conducting discussions. RFP at 66. Inasmuch as MT&H is arguing that the contract specialist imposed a requirement for HUD to engage in discussions, no such requirement was included in the RFP. Thus, at best, MT&H is arguing that the contract specialist's

representation was inconsistent with--but did not change--the express terms of the RFP.

Given that MT&H is asserting that the contract specialist's representation was fundamentally inconsistent with the express terms of the RFP, MT&H was required under our Bid Protest Regulations to file its protest in our Office within 10 days of receiving HUD's response. 4 C.F.R. § 21.2(a)(3). Since MT&H did not file its protest in our Office within 10 days of receiving HUD's response, we dismiss this aspect of MT&H's protest as untimely.

MT&H asserts that it also was misled by the contract specialist into believing that price would not be a significant consideration under the terms of the RFP. In this connection, MT&H maintains that the contract specialist's e-mail also included a representation to this effect, and that the protester therefore believed that the agency would attach little or no importance to price in evaluating proposals and making a source selection decision.

We also dismiss this aspect of MT&H's protest as untimely. As with MT&H's argument concerning the alleged requirement for HUD to conduct discussions, any such representation by the contract specialist changing the relative importance of price would have created a fundamental inconsistency between his representation and the terms of the RFP. The RFP's evaluation factors provided as follows: "While the proposed cost or price will not be assigned a numerical weight, it shall be considered a significant criterion [i]n the overall evaluation of proposals." RFP at 66.

Again, once the protester became aware of any alleged inconsistency between the representation of the contract specialist and the express terms of the RFP, MT&H was required under our Bid Protest Regulations to file its protest in our Office within 10 days of receiving HUD's response to its agency-level protest. 4 C.F.R. § 21.2(a)(3). Since MT&H did not file its protest in our Office within 10 days of receiving HUD's response to its agency-level protest, we dismiss this aspect of MT&H's protest as untimely.

MT&H also asserts that the agency failed to perform a reasonable price evaluation. According to the protester, had the agency adequately evaluated prices, it would have discovered that Brunswick's price was unrealistically low to perform the requirement.

We dismiss this aspect of MT&H's protest for failing to state a basis for protest. Our Bid Protest Regulations, 4 C.F.R. § 21.5(f) (2014) contemplate that we may dismiss any allegation that fails to state a legally sufficient basis for protest. This aspect of MT&H's protest amounts to an allegation that HUD was required--but failed--to conduct a price realism evaluation. However, where, as here, a solicitation contemplates the award of a fixed-price contract, the contracting agency is not

required to conduct a price realism evaluation absent a solicitation provision requiring such an evaluation. Lulus Ostrich Ranch, B-408993.2, Feb. 21, 2014, 2014 CPD ¶ 70 at 4. The RFP here did not provide for conducting a price realism evaluation and, as a result, the agency could not conduct such an evaluation. We therefore dismiss this aspect of the protest.

Finally, MT&H asserts that the agency misevaluated its past performance.² We dismiss this aspect of MT&H's protest because, even if MT&H is correct, the agency's actions could not have prejudiced the firm. In this connection, prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. enrGies, Inc., B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 9-10.

Here, even if MT&H's past performance was assigned the highest possible rating--excellent--its proposal would still have been rated as inferior to Brunswick's under the management work plan factor (as noted, MT&H's proposal received a rating of good under that factor, while Brunswick's proposal received a rating of excellent). In addition, MT&H's proposal was priced significantly higher than Brunswick's. Thus, even if MT&H were correct that HUD misevaluated its past performance, there is no evidence in the record that any such error could have affected the source selection decision or otherwise have prejudiced MT&H; its proposal still would be technically inferior and higher priced. We therefore dismiss this aspect of MT&H's protest.

The protest is dismissed.

Susan A. Poling
General Counsel

² In its original protest, MT&H argued that the agency misevaluated the past performance of Brunswick. In response to the agency report, MT&H no longer contended that the agency misevaluated Brunswick's past performance, and instead challenged the agency's evaluation of its own past performance. Protester's Comments, Aug. 29, 2014, at 9-10.